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BEFORE THE
FEDERAL MARITIME COMMISSION

PARKS INTERNATIONAL SHIPPING, INC., CARGO EXPRESS INTERNATIONAL SHIPPING, INC., BRONX BARRELS & SHIPPING SUPPLIES SHIPPING CENTER INC., AND AINSLEY LEWIS a.k.a. JIM PARKS – POSSIBLE VIOLATIONS OF SECTIONS 8(a), AND 19 OF THE SHIPPING ACT OF 1984, AS WELL AS THE COMMISSION'S REGULATIONS AT 46 C.F.R. PARTS 515 AND 520	Docket No. 06-09

BUREAU OF ENFORCEMENT EXCEPTIONS TO INITIAL DECISION ON REMAND

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I. INTRODUCTION.

This proceeding was instituted by Order of Investigation (Order) served September 19, 2006. The Order was issued by the Commission pursuant to sections 8, 11, 13, and 19 of the Shipping Act of 1984, 46 U.S.C. §§ 40501-40503, 41301-41306, 41107-41108, and 40901-40904. The Order directed that the following specific issues be determined:

1) whether Parks International Shipping, Inc., Cargo Express International Shipping, Inc., Bronx Barrels & Shipping Supplies Shipping Center, Inc., and/or Ainsley Lewis a.k.a. Jim Parks violated section 8(a) of the 1984 Act and the Commission's regulations at 46 C.F.R. Part 520 by operating as common carriers without publishing tariffs showing all of their active rates and charges;

2) whether Parks International Shipping, Inc., Cargo Express International Shipping, Inc., Bronx Barrels & Shipping Supplies Shipping Center Inc., and/or Ainsley Lewis a.k.a. Jim Parks violated section 19 of the 1984 Act and the Commission's regulations at 46 C.F.R. Part 515 by operating as a non-vessel-operating common carriers in the U S. trades without obtaining licenses from the Commission and without providing proof of financial responsibility;

3) whether, in the event violations of sections 8(a) and 19 of the 1984 Act and/or 46 C.F.R. Parts 515 and 520 are found, civil penalties should be assessed against Parks International Shipping, Inc., Cargo Express International Shipping, Inc., Bronx Barrels & Shipping Supplies Shipping Center Inc., and/or Ainsley Lewis a.k.a. Jim Parks and, if so, the amount of the penalties to be assessed; and

4) whether, in the event violations are found, appropriate cease and desist orders should be issued against Parks International Shipping, Inc., Cargo Express International Shipping, Inc., Bronx Barrels & Shipping Supplies Shipping Center Inc., and/or Ainsley Lewis a.k.a. Jim Parks.

The Order named Parks International Shipping, Inc. (Parks), Cargo Express International Shipping, Inc. (Cargo Express), Bronx Barrels & Shipping Supplies Shipping Center Inc. (Bronx Barrels), and Ainsley Lewis a.k.a. Jim Parks as Respondents herein. The Commission's Bureau of Enforcement (BOE) was also named a party to this proceeding.

BOE initiated discovery procedures under Subpart L of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.201, et seq., upon the submission of Interrogatories and Requests for Production of Documents directed to Respondents, served October 19, 2006. Discovery responses were due on or before November 20, 2006. Respondents failed to respond to any of the discovery requests and BOE filed a Motion to Compel Discovery from Respondents on November 28, 2006. Respondents did not file a response to BOE's motion. Administrative Law Judge Clay G. Guthridge (ALJ) granted BOE's motion to compel on April 9, 2007 and ordered Respondents to reply to the discovery requests no later than May 11, 2007. Respondents never furnished responses to any of BOE's Interrogatories and Requests for Production of Documents despite the presiding officer's mandate.

On October 26, 2007, BOE filed a Motion for Sanctions and Summary Judgment requesting, *inter alia*, that the presiding ALJ: (1) impose sanctions against all Respondents for their failure to comply with the ALJ's Order of April 9, 2007 under procedures to include issuing

an Order to Show Cause to Respondents; (2) grant summary judgment against the Respondents for violations of sections 8(a) and 19 of the Shipping Act of 1984 (1984 Act); (3) enter an order assessing civil penalties against Respondents; and (4) issue cease and desist orders against Respondents. BOE's Motion was accompanied by the Verified Statement of Emanuel James Mingione. On October 23, 2009, the ALJ issued a Memorandum and Order, Parks International Shipping, Inc., *et al.* - Possible Violations, 31 S.R.R. 1060, 1062 (ALJ 2009) (Oct. 23 Order) granting BOE's Motion for Sanctions in part, limited by the ALJ solely to the issue of financial ability to pay issues. On the issue of fashioning an appropriate mechanism to consider broader sanctions should Respondents continue to defy the Commission's adjudicative process, the ALJ deferred ruling on BOE's request that Respondents be barred from presenting certain evidence while mentioning only in passing the possibility of issuing an Order to Show Cause to Respondents to address these matters. Id. at 1078.

With respect to BOE's motion for summary judgment, the ALJ again granted relief to BOE only in part, holding that BOE had proven by a preponderance of the evidence that: 1) Parks, Cargo Express, and Bronx Barrels have not published tariffs, obtained OTI licenses, and provided proof of financial responsibility as required by sections 8(a) and 19 of the 1984 Act; 2) with respect to thirty-eight (38) shipments, Parks violated sections 8(a) and 19 of the 1984 Act by operating as an NVOCC that did not publish a tariff, obtain a license, and provide proof of financial responsibility; 3) with respect to fourteen (14) shipments, Cargo Express violated sections 8(a) and 19 of the 1984 Act by operating as an NVOCC that did not publish a tariff, obtain a license, and provide proof of financial responsibility; and 4) with respect to two (2) shipments, Cargo Express violated section 19 by operating as a freight forwarder that did not obtain a license

and provide proof of financial responsibility.[1]

The ALJ established a procedural schedule requiring BOE to submit proposed findings of fact, supporting evidence, and brief some four weeks later, i.e. on or before November 20, 2009. The October 23 Order, Part III, directed that BOE "not propose findings of fact reiterating" those findings already made by the ALJ, and not to re-submit documents included as exhibits in BOE's Motion for Sanctions and Summary Judgment, effectively foreclosing further argument or consideration of these matters at the trial stage. Therefore, in its Opening Brief BOE proposed facts and presented arguments limited solely to the issues of: (1) whether Parks and Cargo Express knowingly and willfully violated sections 8(a) and 19 of the 1984 Act with respect to the activity the ALJ already determined has been proven by a preponderance of the evidence; (2) the appropriate amount of civil penalties to be assessed against Parks and Cargo Express; and (3) the issuance of cease and desist orders against Parks and Cargo Express. Respondents did not appear or otherwise participate at any stage of this proceeding.

In an Initial Decision served on February 5, 2010, the ALJ assessed a civil penalty in the amount of $18,000 against Parks for twelve (12) violations of sections 8(a) and 19 of the 1984 Act and ordered that Parks cease and desist from operating as an unlicensed OTI. The ALJ also assessed a civil penalty in the amount of $412,000 against Cargo Express for sixteen (16) knowing and willful violations of sections 8(a) and 19 of the 1984 and likewise ordered Cargo Express to cease and desist from operating as an unlicensed OTI. Finally, the ALJ ordered that the claims against Bronx Barrels and Ainsley Lewis be dismissed. Parks International Shipping, Inc., *et al.*– Possible Violations, 31 S.R.R. 1166 (ALJ 2010).

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1 The ALJ also held, inter alia, that BOE did not prove violations by Respondents Bronx Barrels and by Ainsley Lewis in his individual capacity, for operating unlawfully as an OTI on any shipments. BOE does not challenge these latter determinations on exceptions herein.

No exceptions were filed. However, the Commission issued a notice on March 4, 2010, to review the Initial Decision on its own motion. By subsequent Order dated April 26, 2012, the Commission vacated the ALJ's Initial Decision and remanded the case to the ALJ for further proceedings consistent with the Commission's decision in Docket No. 06-01, Worldwide Relocations, Inc., *et al.* – Possible Violations, 32 S.R.R. 495 (FMC 2012)

By Order dated May 1, 2012, the ALJ directed BOE to file a supplemental brief addressing the issues raised by the Commission on remand. BOE filed its Brief on Remand on June 1, 2012. Respondents did not submit a response.

On December 31, 2012, the ALJ issued his Initial Decision on Remand finding, as in the prior Initial Decision, that while Parks violated sections 8(a) and 19 of the Shipping Act, it did not do so knowingly and willfully. As a result the ALJ assessed a civil penalty against Parks totaling $18,000 for 12 violations, the same penalty amount assessed previously. The ALJ further found that Cargo Express knowingly and willfully violated sections 8(a) and 19 of the Shipping Act and assessed a civil penalty of $388,000 for 16 violations, reducing this penalty by $24,000 overall. The ALJ renewed his cease and desist orders against Parks and Cargo Express.

Pursuant to Rule 227 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.227, BOE hereby submits its exceptions to the ALJ's findings.

II. EXCEPTIONS.

BOE takes exception to the Initial Decision on Remand as follows:

(1) The ALJ erred in deferring a decision on BOE's motion for sanctions and to issue an appropriate and timely Order to Show Cause to the Respondents;

(2) The ALJ erred in finding that Parks did not knowingly and willfully violate sections 8(a) and 19 of the Shipping Act; and

(3) The ALJ erred in failing to assess an adequate civil penalty against Parks.

III. ARGUMENT.

A. The ALJ erred in deferring a decision on BOE's motion for sanctions against Respondents

Throughout the 7-year course of this proceeding, BOE's case was prosecuted on a default basis where the absence of Respondents' participation has significantly frustrated BOE's attempts at completing discovery and creating a comprehensive evidentiary record. BOE attempted to overcome some of these problems by filing a Motion for Sanctions and Summary Judgment requesting that a series of proposed sanctions be coupled with an Order to Show Cause "notify[ing] Respondents that, if they fail to reply as directed, they will be found to have violated the 1984 Act as alleged and, BOE's Motion for Sanctions and Summary Judgment will thereby be granted." Id. at 5. On October 23, 2009, the ALJ issued an Order deferring most of BOE's sanctions requests except to the limited extent of drawing an adverse inference that "each Respondent has the ability to pay a civil penalty up to and including the maximum amount that could be imposed for any violation or violations of the Shipping Act that the Respondent is found to have committed." Parks, 31 S.R.R. at 1063. The ALJ's Order briefly addressed BOE's

request for an Order to Show Cause in the section establishing the procedural schedule toward the very end wherein the ALJ stated that "[i]f Respondents choose to respond to BOE's filings, Respondents shall show cause why additional sanctions should not be imposed on it for failing to respond to BOE's discovery requests and to other orders in this proceeding." Id. at 1078. BOE's show cause request is never revisited by the ALJ. In his Initial Decision on Remand, the ALJ simply recounts and uncritically adopts what he already stated in his Order of October 23, 2009. This can hardly be the substantive treatment that the Commission envisioned when it vacated the ALJ's earlier handling of this issue, explicitly citing in its Order of April 26, 2012 that "[t]he ALJ did not address BOE's request for an Order to Show Cause notifying respondents that judgment may be entered in BOE's favor."

At the time of the ALJ's Order deferring action on BOE's request, three years had already passed since the commencement of this docket. BOE was entitled to a simple "yes or no" ruling on its motion for sanctions. No party appeared or counseled for deferral of BOE's motion, and even now the ALJ proffers no rationale for having deferred action on BOE's well-pled request. At such point in the proceeding, it would have been appropriate for the ALJ to place Respondents on notice of the ALJ's intention to impose sanctions, and thereafter draw suitable and comprehensive inferences against the Respondents based on their failure to provide discovery.[2]

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[2] The presiding officer has an arsenal of sanctions available to employ against recalcitrant and/or defaulting respondents. See Banfi Products Corp. – Possible Violations, 26 S.R.R. 30 (FMC 1991) ("The ALJ should apply such approaches as appear appropriate in the circumstances, including, but not limited to, the drawing of adverse inferences and the use of secondary evidence."); Refrigerated Container Carriers Pty. Limited – Possible Violations, 28 S.R.R. 798 (ALJ 1999) (due to Respondent's failure to reply, BOE's Requests for Admissions are deemed admitted); Shipman International (Taiwan) Ltd. – Possible Violations, 28 S.R.R. 100, 104 (ALJ 1998) (barring defaulting Respondent from introducing certain evidence); World Line Shipping, Inc. and Saeid B. Maralan (aka Sam Bustani), *et al.* – Possible Violations, 28 S.R.R. 927, 930-931 (ALJ 1999) (drawing adverse inferences and barring Respondents from introducing certain

See Worldwide Relocations, 32 S.R.R. at 503 (reversing ALJ's denial of BOE's motion for sanctions, imposing the sanctions on appeal, and drawing adverse inferences).

The Commission has long recognized the importance that Commission investigations not be improperly constrained or blunted in situations where "evidence is possessed by recalcitrant respondents who believe they might profit by their refusals to furnish evidence and thus stymie BOE in its attempts to prove violations of law which the Commission is charged to stop." Alex Parsinia *dba* Pacific International Shipping and Cargo Express, 27 S.R.R. 1225, 1226 (ALJ 1997). The Commission has likewise stated:

> Compliance with discovery is the backbone of BOE's ability to conduct investigations pursuant to the Commission's Shipping Act responsibilities. Absent compliance with discovery requests, BOE would be seriously hampered in its ability to construct a factual record to establish the existence of violations of the Shipping Act. Failure to cooperate with discovery thus undermines the Commission's investigative processes and responsibilities. Failure to comply with discovery has been held to be a serious matter warranting extraordinary measures in other fora as well.

Kin Bridge Express *et al.* – Possible Violations, 28 S.R.R. at 979. BOE's duty to obtain relevant evidence, as well as its ability to prepare an evidentiary record coupled with the need to rely on sanctions issued against a Respondent during that process, have all been considered important factors in the effective conduct of Commission proceedings. Alex Parsinia, 27 S.R.R. at 1226; World Line Shipping, Inc. and Saeid B. Maralan (aka Sam Bustani), *et al.*, 28 S.R.R. at 930;

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evidence); Kin Bridge Express Inc. and Kin Bridge Express (U.S.A.) Inc. – Possible Violations, 28 S.R.R. 978, 979 (FMC 1999) (suspending NVOCC tariff of Respondent as a sanction for failing to comply with discovery); Universal Logistic Forwarding Co., Ltd. – Possible Violations, 29 S.R.R. 36, 37 (ALJ 2001) (prohibiting Respondent from submitting certain evidence as a sanction); Transglobal Forwarding Co., Ltd – Possible Violations, 29 S.R.R. 813, 814 (ALJ 2001) (barring Respondent from submitting certain testimonial or documentary evidence); Hudson Shipping (Hong Kong) Ltd. *dba* Hudson Express Lines – Possible Violations, 29 S.R.R. 702, 702-03 (ALJ 2002) (barring Respondent from attempting to contradict evidence put forward by BOE at a later stage in the proceeding); and Monarch Shipping Lines, Inc., *et al.* – Possible Violations, 30 S.R.R. 211, 215 (ALJ 2003) (BOE's Requests for Admissions deemed admitted as sanction).

Universal Logistic Forwarding Co., Ltd., 29 S.R.R. at 37; and most recently, Worldwide Relocations, 32 S.R.R. at 503.

That the ultimate outcome of the decision was not defeated by the ALJ's miscarriage does not cure the error. A decision on BOE's motion at that time would, of course, guide BOE in the preparation and presentation of its case, by narrowing those issues that the ALJ alone insisted were still contested on the record, and by permitting BOE to further develop items otherwise foreclosed by the ALJ's interim ruling. Perversely, in deferring BOE's call for a hearing upon sanctions and in then directing that BOE instead proceed immediately to filing of its direct case on less than 30 days' notice, the ALJ penalized and burdened the moving party for the derelictions of the absconding Respondents. This result cannot be allowed to stand.

B. The ALJ erred in finding that Parks did not act knowingly and willfully when it operated as an unlicensed and unbonded NVOCC

Multiple times during the course of this proceeding BOE presented evidence and argument demonstrating that when Parks acted as an unlicensed OTI in 2001 and 2002, it did so knowingly and willfully. Respondent Parks neither appeared nor contested BOE's evidentiary showing thereon. In his prior Initial Decision, the ALJ nonetheless decided that, because there was no affirmative evidence that Parks "knew of the existence of the Shipping Act and its license, bonding, and tariff requirements," Parks' activities could not be deemed willfully and knowingly committed. Id. at 38. The Commission subsequently vacated that decision.

In its Brief on Remand, BOE again pointed to evidence establishing that Parks had a history of advertising as an OTI to the general public, signed a series of service contracts with an ocean common carrier while misrepresenting its status as a cargo owner, and tendered numerous shipments of its customers' household goods and personal effects pursuant to those contracts.

BOE Proposed Findings of Fact ¶¶ 9-14; and BOE Brief on Remand, at 9-10. BOE emphasized the fact that the first service contract executed by Parks in April 2001 contained specific language putting Parks on notice that it was entering a relationship subject to regulation by the Commission and the filing of an OTI bond if Parks intended to act as an NVOCC. Id. at 9-10.

The ALJ was instantly hostile to BOE's plea to reconsider the ALJ's findings as to whether Parks' violations were willful and knowing, concluding peremptorily that Worldwide Relocations (FMC) does not address the issue of willfully and knowingly violating the Act," Initial Decision on Remand at 49. Indeed, wholly ignoring the Commission's admonition in Worldwide Relocations that advertising as an OTI gives rise to a rebuttable presumption that Respondent Parks "does what it advertises," 32 S.R.R. at 505, the ALJ finds that the fact that Parks International "advertised itself to the general public as an OTI/NVOCC does not support a finding" that Parks operated willfully and knowingly in transporting goods in violation of the Shipping Act. Initial Decision on Remand at 53. The ALJ thus reinstates his preclusive finding that BOE must affirmatively prove that Parks International or Ainsley Lewis, its chief executive, "knew of the existence of the Shipping Act and its licensing, bonding and tariff requirements." Id.

It seems common sense that a bank robber is not entitled to a "second bite at the apple" because he cannot be shown to have read 18 U.S.C. § 2113; neither would an unlicensed motorist found operating on the public highway have claim to be set free at trial because he failed to first read his respective state's motor vehicle code.[3] The common law doctrine of "ignorance of the

3 In 1907, the Supreme Court declared that "[i]f a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent." Ellis v. United States, 206 U.S. 246, 257 (1907)

law is no excuse"[4] imputes knowledge of applicable laws to all persons within the jurisdiction, no matter how transiently, whether in criminal law or under the Shipping Act. See e.g., Pacific Far East Line – Alleged Rebates, 11 F.M.C. 357, 363-64 (1968).

BOE submits that the ALJ's imposition of an actual knowledge standard was erroneous and contrary to law. Moreover, in accordance with the teaching of Worldwide Relocations, and the Commission's express instruction to the ALJ herein to apply the findings of Worldwide Relocations, the ALJ should have drawn the inference that Parks' violations were committed knowingly and willfully.

BOE argued that, apart from Parks' likely acquisition of information about regulatory requirements disseminated among members in the shipping community, industry-wide publication and distribution of information about various Commission OTI rulemakings and formal proceedings put Parks on notice that the Shipping Act required it to obtain a license and proof of financial responsibility prior to commencing its OTI operations. Significantly, these rulemakings and proceedings were contemporaneous with Parks' formation and startup in the business, and duly published in the Federal Register. Consequently, Parks is charged with or presumed to have notice of the statute's requirements. See 44 U.S.C. § 1507 (filing document in Federal Register as constructive notice) and 44 U.S.C. § 1508 (filing and publication of documents required to be published by an Act of Congress is sufficient notice of the contents of the document to persons subject to or affected by it.).

The past 15 years have been replete with Commission activities highlighting the statutory and regulatory requirements applicable to ocean transportation intermediaries and those who would propose to operate in the regulated shipping industry. Upon enactment of the Ocean

4 *Ignorantia juris non excusat.*

Shipping Reform Act of 1998 (OSRA), Pub. L. 105-258, the Commission actively provided guidance to the shipping public by conducting a rulemaking proceeding, Docket No. 98-28, wherein it solicited comments from the industry and outlined the obligations of all OTIs pursuant to OSRA's new licensing and bonding requirements. See Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries, Notice of Proposed Rulemaking, 63 F.R. 70710 (Dec. 22, 1998); 28 S.R.R. 629 (FMC 1998). Once adopted, the Commission's Final Rule therein was published 64 F.R. 11156 (Mar. 8, 1999).

In order also to bring its service contract regulations into alignment with OSRA, the Commission initiated Docket No. 98-30, Service Contracts Subject to the Shipping Act of 1984, Notice of Proposed Rulemaking, 63 F.R. 71062 (Dec. 23, 1998); Interim Final Rule, 64 F.R. 11186 (Mar. 8, 1999). In revisiting the need for service contract certifications by shipper parties and confirming such requirement, the Commission specifically remarked that "the shipper status certification requirement serves both to remind shippers in what capacity they may enter into service contracts, and to assist carriers to ensure they enter into a service contract only with compliant NVOCCs." Service Contracts Subject to the Shipping Act of 1984, 64 F.R. 23782 (May 4, 1999); 28 S.R.R. 724, 733 (FMC 1999).

Subsequently, in 2000, when multiple members of the OTI community failed to come into compliance with new requirements of OSRA, the Commission commenced Docket No. 00-12, Revocation of Licenses, Provisional Licenses and Order to Discontinue Operations in U.S.-Foreign Trades for Failure to Comply with the New Licensing Requirements of the Ocean Shipping Reform Act of 1998, directing named OTIs to show cause why their licenses should not be revoked, and orders to cease and desist issued to enforce the new licensing requirements announced under OSRA. See Order to Show Cause, 65 F.R. 77879 (Dec. 13, 2000). In

explaining the basis for its actions therein, the Commission explicitly acknowledged the actions of Commission staff "to inform and advise all OTIs of the new requirements and to encourage them to comply with those requirements promptly and voluntarily." 29 S.R.R. 193 (FMC 2001). Notice of OTI license revocations was published subsequently, 66 F.R. 27143 (May 16, 2001).

In addition to publicizing the adoption of the aforementioned regulations, the Commission issued and published in the Federal Register several Orders as to other unlicensed, unbonded entities operating between the U.S. and the Caribbean, the same trade lanes in which Parks was competing as an OTI. See e.g., Docket No. 99-15, David P. Kelly and West Indies Shipping & Trading, Inc. – Possible Violations, 64 F.R. 44928 (Aug. 18, 1999)[5] (Order issued to determine, *inter alia*, whether Respondents violated sections 8 and 19 of the 1984 Act by operating as unlicensed, unbonded OTIs); Docket No. 00-05, World Line Shipping, Inc. and Saeid B. Maralan (aka Sam Bustani), 65 F.R. 24697 (Apr. 27, 2000)[6] (Respondents ordered to show cause why they should not be found in violation of the Shipping Act by operating as unlicensed, unbonded OTIs); and Docket No. 01-07, Tignes, Inc. – Application for a License as an Ocean Transportation Intermediary, 66 F.R. 35436 (July 5, 2001) (proceeding instituted to determine whether applicant qualified to render OTI services).[7]

In the Initial Decision on Remand, the ALJ swept aside BOE's contentions that Parks can be charged with actual or constructive knowledge of the statute's licensing requirements, suggesting hyperbolically that "[i]f a finding that a respondent willfully and knowingly violated

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[5] 28 S.R.R 1057 (FMC 1999).

[6] 28 S.R.R. 1395 (FMC 2000).

[7] 29 S R.R. 197 (FMC 2001).

the Act could be based on the fact that the violation occurred after the Act was passed, all violations would be willful and knowing," Id. at 54.

Contrary to the ALJ's determination, the Commission long ago made it clear that a knowing and willful violation does not require actual knowledge that the requirements of the statute are being violated or disregarded:

> Such a construction would make ignorance of the law a valid defense and substitute some subjective standard whereby actual knowledge of statutory language by a shipper would have to be established before a violation under this section could be found. Congress did not intend to impose such a novel evidentiary requirement. Pacific Far East Lines – Alleged Rebates, 11 F.M.C. at 363-364.

The federal courts likewise do not attach an actual knowledge requirement. See e.g., Union Petroleum Corp. v. United States, 376 F.2d 569, 573 (10th Cir. 1967) ("[T]he term 'knowingly' imports merely perception of the facts necessary to bring the questioned activity within the prohibition of the statute. The term does not require as part of its meaning that there necessarily be knowledge or awareness that such activity is in fact prohibited.").

The Commission explained the criteria for finding that a violation was committed knowingly and willfully in Pacific Champion Express Co., Ltd. – Possible Violations, 28 S.R.R. 1397, 1403 (FMC 2000), as follows:

> In determining whether a person has violated the 1984 Act "knowingly and willfully," the evidence must show that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the 1984 Act. Portman Square Ltd.-Possible Violations of 10(a)(1) of the Shipping Act of 1984, 28 S.R.R. 80, 84-85 (I.D.), finalized March 16, 1998. The Commission has further held that "persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a [person] is acting knowingly and willfully in violation of the Act. Diligent inquiry must be exercised by [persons] in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation.'" [citation omitted].

Malicious intent to break the law is not required. Shipman Int'l (Taiwan) Ltd. – Possible Violations, 28 S.R.R. at 109. An NVOCC, moreover, is obligated to "educate itself through normal business resources, and repeated failure to do so may indicate that it is acting 'willfully and knowingly' within the meaning of the statute." Stallion Cargo, Inc. – Possible Violations, 29 S.R.R. 665, 677 (FMC 2001).

It is this latter standard, endorsed by the Commission in Stallion Cargo, that BOE urges be applied in this case, as supported by accepted industry practice and common knowledge in the shipping business since 1998, and earlier. Parks itself has existed in corporate form since 1999. It has provided NVOCC services since at least 2001, as evidenced by shipments it handled that are now beyond the statute of limitations, but which the ALJ nonetheless considered as an aggravating factor in assessing a civil penalty. I.D. at 57. BOE submits that Parks' longevity in the matter of handling shipments as an NVOCC reasonably supports the inference that Parks was familiar with the requirements of the law, and justifies the finding that Parks' violations were committed knowingly and willfully. Through Parks' active participation in the industry as an NVOCC, as well as the various Commission pronouncements disseminated to the shipping industry throughout the relevant time period, Parks knew, and must be presumed to have known of, the licensing, tariff, and financial responsibility requirements of the Shipping Act.

At all times, Parks was obligated to diligently inform itself through normal business resources of such requirements applicable to its business and operations, Pacific Champion Express Co., Ltd., supra, said requirements reasonably to include the FMC licensing, bonding, tariff and service contracting provisions applicable to OTIs. Parks' failure in this respect was at its own peril. Stallion Cargo, Inc., 29 S.R.R. at 677. At best, Parks was indifferent to the

requirements of law; at worst, it deliberately disregarded the statute. In either case, its actions and inactions sufficiently establish that its violations were knowingly and willfully committed. Comm-Sino Ltd. – Possible Violations, 27 S.R.R. 1201 (ALJ 1997); Ever Freight International Ltd. – Possible Violations, 28 S.R.R. 329 (ALJ 1998); Best Freight International Ltd. – Possible Violations, 28 S.R.R.447 (ALJ 1998).

Of equal import, Parks chose not to participate in this proceeding or to submit any materials rebutting the contents of the evidentiary record, and the inferences that may be reasonably drawn therefrom, that Parks had notice of and knowingly and willfully violated the Act. Indeed, Parks' advertising as an OTI gives rise to the presumption, never rebutted by Respondent, that Parks International "does what it advertises." Worldwide Relocations, 32 S.R.R. at 505. In accordance with the standards explained in Worldwide Relocations, 32 S.R.R. at 503-507, BOE submits that it has established by a preponderance of the evidence that Parks knowingly and willfully violated sections 8(a) and 19 in at least thirty-eight (38) instances between 2001 and 2002.[8] Given Parks' decision not to rebut nor contest BOE's evidence, it is both reasonable and appropriate to infer that Parks acted knowingly and willfully in violating the Act.

BOE therefore urges the Commission to reverse the ALJ's determinations on this issue and find that Parks acted knowingly and willfully with respect to the established violations. Given the number of opportunities the ALJ has had to consider this issue, including on remand with instructions to employ those inferences and presumptions permitted by the Commission's decision in Worldwide Relocations, BOE submits that no useful purpose would be served by yet another remand. The Commission should exercise its authority pursuant to Rule 227 of the

8 While finding violations on 38 shipments by Parks, Initial Decision on Remand at 48, the ALJ assessed penalties only on 12 shipments. He concluded that the remaining shipments occurred outside the five-year statute of limitations for assessment purposes

Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.227, consider the issue *de novo*, vacate the ALJ's findings, and enter appropriate findings that Parks' violations were knowing and willful.

C. The ALJ erred in failing to assess an adequate civil penalty against Parks

In the Initial Decision on Remand, the ALJ found that Parks committed 12 violations of the Shipping Act which are subject to a civil penalty. However, because the ALJ also found that those violations were not committed knowingly and willfully, he proceeded to assess the same penalty of $1,500 per violation as in his now-vacated Initial Decision and imposed a lump sum penalty of $18,000.[9] We submit that the nominal penalties assessed against Parks are inconsistent with the purpose and intent of the penalty provisions of the statute; incorrectly consider factors not enumerated in the Act or the Commission's regulations governing civil penalties; and fail to properly weigh the enumerated penalty factors in arriving at an adequate amount appropriate to the gravity of the violations.

1. The Regulatory Structure for Shipping Act Violations

A person who violates the Act, or regulation or order of the Commission incurs liability for a civil penalty. 46 U.S.C. § 41107(a). Liability is not discretionary – it is absolute. Until a matter is referred to the Attorney General, assessment of the amount of the penalty is entrusted to the Commission. 46 U.S.C. § 41109(a). The statute contemplates that certain violations are exponentially more serious than others and therefore should be subject to a much higher penalty.

[9] With regard to the ALJ's finding that Cargo Express committed 16 knowing and willful violations of the Shipping Act, the ALJ assessed a civil penalty of $388,000. Given other, more significant errors be addressed, BOE does not except to the adequacy of this penalty as it falls within the reasonable and definable parameters distinguishing violations committed willfully and knowingly. However, this should not be construed to reflect BOE's agreement with either the factors or the impenetrable methodology employed by the ALJ in arriving at the penalty amount. See, infra.

Thus a two-tiered range of penalties is provided – up to $6,000 for each violation or, if knowingly and willfully committed, up to $30,000 per violation. 46 U.S.C. § 41107(a).

In determining the amount of a civil penalty, the Commission is required to take into account the nature, circumstances, extent, and gravity of the violation committed, and with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. 46 U.S.C. § 41109(b). To these statutorily prescribed factors, the Commission's regulations add the policies of deterrence and future compliance with the law. 46 C.F.R. § 502.603(b).

The primary Congressional purpose of imposing civil penalties is to deter future violations of the statute. Stallion Cargo, Inc., 29 S.R.R. at 681. The Commission may in its discretion determine how much weight to place on each factor and must make findings with respect to each factor. Merritt v. United States, 960 F.2d 15, 17 (2nd Cir. 1992).

2. The ALJ's Findings as to Penalties are Contrary to Law

In response to the ALJ's Order on Remand, BOE addressed each of the section 13(c) factors. Based on those factors, along with a basis for finding that Respondents' violations were willfully and knowingly committed, and the absence of any relevant mitigating factors, BOE argued that a civil penalty of $6000 - $30,000 for each violation is appropriate. BOE Brief on Remand at 14-15.

At the outset, the ALJ concludes that the Act requires that penalties be assessed on a shipment-by-shipment basis. Although this is a path paved with good intentions, no statutory language or case precedent requires such detour. See e.g., Arctic Gulf Marine Inc., Peninsula Shippers Association Inc and Southbound Shippers Inc., 24 S.R.R. 159 (FMC 1987) (aggregate penalty of $1,000,000); Sea-Land Service, Inc. - Possible Violations, 30 S.R.R. 872 (FMC 2006)

(aggregate penalty of $800,000 assessed). Expanding on that finding, however, the ALJ finds, as a matter of law, that the Commission must take into account such factors as the size of the shipment and whether there were problems with the shipment resulting in harm to the shipper Initial Decision on Remand at 56, 64-65.[10] This finding is contrary to the plain language of the statute, the Commission's regulations and Commission precedent. Section 13(c) directs the Commission to take into account the nature, circumstances, extent, and gravity of the violation committed – in this case, operating without a license or bond in violation of section 19. Therefore, the statute unambiguously requires the Commission to take into account the nature, circumstances, extent and gravity of Respondents' unlicensed, unbonded operations – not the circumstances surrounding each shipment. The ALJ's unwarranted departure from the explicit penalty criteria set in section 13(c) of the Act thus gives rise to variable and inconsistent penalty amounts calculated on a shipment-by-shipment basis, without clear or meaningful distinctions to be drawn among them. Such a result is untenable.

The Commission has previously ruled that the additional factors considered by the ALJ in assessing a penalty amount for each of the shipments, specifically harm to shipper, are not relevant components in the penalty determination. In Stallion Cargo, supra, the Commission held erroneous the ALJ's refusal to assess penalties for certain violations in the absence of evidence that the shippers were harmed:

> Under Commission precedent, however, whether Stallion's shipper customers or other shippers were harmed is relevant neither to the issue of whether it committed

[10] The fallacy of using such factors as size or value of the shipment is highlighted in the case of household goods where shipments often consist of personal belongings accumulated over a lifetime, some with substantial sentimental value unmatched by its replacement monetary value. Certainly, the size or value of the shipment have no relation to the breach of trust by the operator to the customer. Neither, we submit, should small shippers be seen as entitled to lesser protections or lesser remedies than their larger counterparts.

> a violation, nor to that of what penalties should be assessed against it. In Commission-instituted proceedings, unlike in private complaint proceedings, it is not necessary that the violation of a statute result in harm to the public for the respondent to be liable. (Emphasis added). 29 S.R.R. at 678-679.

Consequently, the ALJ confounded his analysis by considering particular factors and circumstances surrounding each shipment, and then imposing an arbitrary penalty amount on a shipment-by-shipment basis. For example, one extraneous factor relied on by the ALJ was the amount of freight and other charges paid by Parks to Tropical. Id. at 48-49, and note 10. How this has any bearing on the civil penalty amount, and what relative weight is attributed to this particular factor, is left unexplained by the ALJ. Logic dictates that it has none. Except as found in the plain language of the statute or the Commission's regulations, the ALJ should decline to embellish upon the prescribed civil penalty factors.

Commission precedent makes clear that the main congressional purpose of imposing civil penalties is to deter future violations of the statute. Stallion Cargo, supra, 29 S.R.R. at 681, and Portman Square, supra, 28 S.R.R. at 85. Following Congress' action raising the maximum penalties for violations from the previous $5,000 per violation to up to $25,000 for violations committed knowingly and willfully, the Commission instituted a number of rulemaking proceedings to implement the newly adopted Shipping Act of 1984, including Docket No. 84-20 to revise its rules and establish criteria and procedures for the handling of penalty claims. The language proposed in the Notice of Proposed Rulemaking, 49 F.R. 18874 (May 3, 1984), and adopted in then-46 C.F.R. § 505.3(b), was identical to the provision as it appears today in current 46 C.F.R. § 502.603(b), including the requirement that "the policies for deterrence and future compliance with the Commission's rules and regulations" be taken into account. Since that time, the Commission has been unwavering in addressing the main Congressional purpose of deterrence

and compliance when imposing civil penalties. Pacific Champion Express Co., Ltd. - Possible Violations, 28 S.R.R. at 1404-1405 (stating that the applicable statutory factors include "the need to send an appropriate message of deterrence"); Kin Bridge Express supra, 28 S.R.R. at 994 ("[t]he instant task is to fix civil penalties that will send a message of punishment and deterrence"); Ever Freight International Ltd., *et al.* – Possible Violations, 28 S.R.R. at 335 (explaining that to assess less than the maximum would not serve the purpose of deterrence and would send the wrong message); and Martyn Merritt, AMG Services, 26 S.R.R. 663, 664 (FMC 1992) ("In determining the amount of penalties to be imposed, it is expected that the ALJ will give due regard to . . . the Congressional purpose to deter violations by imposing greater penalties in the 1984 Act."). Indeed, in an analogous penalty situation in which all Shipping Act violations were knowingly and willfully committed, the penalty issue was recast by the Commission as requiring the Administrative Law Judge to "address the question of why the maximum potential penalties should not be assessed." Arctic Gulf Marine Inc., supra, 24 S.R.R. at 160.

Certainly, the Commission's policies for deterrence and future compliance in the context of the assessment of civil penalties have been clearly established and well settled for a quarter of a century. Furthermore, Parks has been determined to have the ability to pay a civil penalty up to and including the maximum amount that could be imposed for violations of the Shipping Act. As BOE already argued and demonstrated, the violations committed by Parks were knowing and willful. Therefore, the imposition of penalty amounts in a significantly increased dollar amount, i.e. not less than $6,000 nor more than $30,000 per violation, against Parks is warranted in this case. However, even if the Commission determines that Parks' violations were not knowing and willful, the ALJ's penalty assessment of $1,500 per violation constitutes little more than a cost of doing business. This is an affront to the Commission's established policies of deterrence and

future compliance. Accordingly, BOE submits that the Commission would be well justified to exact a greater monetary penalty, not to exceed $6,000 per violation, under the circumstances presented here.

IV. CONCLUSION.

For the foregoing reasons, BOE submits that the ALJ erred in: (1) deferring and then failing to timely rule on BOE's requests for sanctions against Respondents including issuing an appropriate Order to Show Cause; (2) failing to find that Parks acted knowingly and willfully in continuously performing unlicensed NVOCC operations; and (3) failing to assess an appropriate civil penalty against Parks. Accordingly, it is respectfully requested that after consideration of these Exceptions and the record in this proceeding, the Commission find that Parks knowingly and willfully violated sections 8(a) and 19 of the Shipping Act and assess the civil penalty fully commensurate with the knowing and willful character of Park's twelve violations. Should the Commission believe that a civil penalty less than the maximum is warranted in this case, BOE urges that such penalty should be not less than $6000 per violation nor exceed $30,000 per violation.

Respectfully submitted,

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February 26, 2013

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served on this date by first class mail, upon all parties of record, at their addresses of record with the Commission.

Signed in Washington, D.C. on February 26, 2013.

Julie L. Berestov